THE HIGH COURT OF SIKKIM : GANGTOK

R.F.A. NO.3 OF 2004

In the matter of an appeal against the judgment and orders dated 21.06.2004 passed by the District Judge, South and West Sikkim at Namchi in Title Suit no. 1 of 2004.

and

In the matter of

Sonam Gyatso Bhutia,
S/o late Dongchen Bhutia,
R/o Rinchenpong Bazar,
P.O. Rinchenpong,
West Sikkim. **... Appellant**

Versus

1. State of Sikkim through
The Secretary,
Department of U.D. & H.D.,
Government of Sikkim,
Gangtok.

2. Ganga Ram Chettri,
R/o Rinchenpong Busty,
P.O. Rinchenpong,
West Sikkim.

3. Ashok Kumar Goutam,
S/o Ganga Ram Chettri,
R/o Rinchenpong Busty,
P.O. Rinchenpong,
West Sikkim.

4. The District Collector,
West District of Sikkim,
Gyalshing,
West Sikkim.

5. The Secretary,
Land Revenue Department,
Government of Sikkim,
Tashiling, Gangtok.

6. Smt. Janak Kumari,
D/o Ganga Ram Chettri,
R/o Rinchenpong Busty,
West Sikkim. **... Respondents**

For appellant : A. Moulik, Advocate

For respondents no. 2,3 & 6 : A. K. Upadhyaya, Advocate.

For respondents no.1,4 & 5 : Messrs S. P. Wangdi, Advocate General and J. B. Pradhan, Government Advocate.

PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE

Date of judgment : 01.11.2004.

J U D G M E N T

R. K. PATRA, C.J.

The unsuccessful plaintiff is the appellant in this appeal which is directed against the decree dated 25.6.2004 passed by Shri B.C. Sharma, District Judge (south & west districts) at Namchi dismissing Title Suit no. 1 of 2004.

2. The appellant filed the aforesaid suit principally for declaration of title, confirmation of possession and alternatively for recovery of possession of the suit land. Briefly stated his case is that the suit land measuring about 1.28 acre bearing plot number 286 as per survey record of 1950-51 (renumbered as plot number 390 measuring .0740 hectare as per survey record of 1980-81) situated at Rinchenpong Bazaar originally belonged to his late father Dongchen Bhutia who died in the year 1961. The suit land has been in his continuous possession from the time of his father with a dwelling house thereon. He is a member of the Bhutia community and Revenue Order No. 1 of 1917

prohibits transfer of land belonging to Bhutia community in favour of a non-Bhutia or non-Lepcha community. Respondents no. 2, 3 and 6 (defendants no. 2, 3 and 6) are not members of Bhutia community and therefore any transfer of the appellant's land in their favour by the state government is null and void and is liable to be cancelled. In and around 1981, Ganga Ram Chettri (respondent no. 2), constructed his r.c.c. building covering an area of 40' x 30' of the suit land on the plea that it was allotted to him by the state government (respondent no. 1). A portion measuring 20' x 30' appertaining to the suit land was also allotted by the state government (respondent no. 1) to Smt. Janak Kumari (respondent no. 6) in the year 1980 on which she has also raised a construction. In the year 1996, when question of partition of the suit land amongst the appellant and his brothers arose, it came to his knowledge that the suit land had been allotted by the state government unauthorisedly to respondents 2 and 6 for construction of the buildings. Thereafter after serving notice, he filed the suit.

The respondents contested the suit by filing their separate written statements. Their common case is that the suit land is part and parcel of Rinchenpong Bazaar Compound covered by plot no. 286 (corresponding to plot no. 390 as per the new survey) and therefore no illegality

was committed by the state government in allotting the suit land to respondents 2 and 6 or to any other person. The private respondents' further case is that they have perfected their rights over the suit land by adverse possession.

3. In the premises stated above the learned trial Judge framed eleven issues. The appellant besides exhibiting a number of documents examined three witnesses including himself as PW-1. The respondents examined five witnesses on their behalf. They also produced a number of documents in support of their case.

4. The learned trial Judge dismissed the suit holding that it is barred by time by accepting the respondents' plea of adverse possession. According to him respondents no. 2 and 6 raised their construction on the suit land in the year 1980-81 which was within the knowledge of the appellant but the suit was filed in February 2002 after more than 20 years.

5. Shri Moulik, learned counsel for the appellant contended that the plea of adverse possession taken by the private respondents is not available to them in view of the decision of the Supreme Court in Amrendra Pratap Singh v. Tej Bahadur Prajapati AIR 2004 SC 3782. His contention is that for acquisition of title by adverse possession, the right in the property must be alienable and is capable of being acquired by the competitor and in view of the prohibition of

transfer contained in the Revenue Order No. 1 of 1917, the private respondents cannot acquire title by setting up a plea of adverse possession against the appellant in view of the admitted position that he belongs to Bhutia community whereas the private respondents are non-Bhutia.

6. In the above case the Supreme Court was considering section 3 of the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations (Regulation 2 of 1956). In that case a person belonging to a non-Scheduled Tribe was claiming title by adverse possession against a tribal. In paragraph 25 and 26 of the judgment the Court observed as follows:

> "..... .....the ultimate ownership vests in the State on the principle of eminent domain. Tribals are conferred with a right to hold land, which right is inalienable in favour of non-tribal. It is clear that the law does not permit a right in immovable property vesting in a tribal to be transferred in favour of or acquired by a non-tribal, unless permitted by the previous sanction of a competent authority. The definition of 'transfer of immovable property' has been coined in the widest possible terms. The definition makes a reference to all known modes of transferring right, title and interest in immovable property and to male the definition exhaustive, conspicuously employs the expression – "any other dealing with such property," which would embrace within its sweep any other mode having an impact on right, title or interest of the holder, causing it to cease in one and vest or accrue in another. The use of the word 'dealing' is suggestive of the legislative intent that not only a transfer as such but any dealing with such property (though such dealing may not, in law, amount to

transfer), is sought to be included within the meaning of the expression. Such 'dealing' may be a voluntary act on the part of the tribal or may amount to a 'dealing' because of the default or inaction of the tribal as a result of his ignorance, poverty or backwardness, which shall be presumed to have existed when the property of the tribal is taken possession of or otherwise appropriated or sought to be appropriated by a non-tribal. In other words, a default or inaction on the part of a tribal which results in deprivation or deterioration of his rights over immovable property would amount to 'dealing' by him with such property, and hence a transfer of immovable property. It is so because a tribal is considered by the Legislature not to be capable of protecting his own immovable property. A provision has been made by para 3-A of the 1956 Regulations for evicting any unauthorized occupant, by way of trespass or otherwise, of any immovable property of the member of the Scheduled Tribe, the steps in regard to which may be taken by the tribal or by any person interested therein or even suo motu by the competent authority. The concept of locus standi loses its significance. The State is the custodian and trustee of the immovable property of tribals and is enjoined to see that the tribal remains in possession of such property. No period of limitation is prescribed by para 3A. The prescription of the period of 12 years in Art. 65 of the Limitations Act becomes irrelevant so far as the immovable property of a tribal is concerned. The tribal need not file a civil suit which will be governed by law of limitation; it is enough if he or anyone on his behalf moves the State or the State itself moves into action to protect him and restores his property to him. To such an action neither Art. 65 of Limitation Act nor S. 27 thereof would be attracted.

In our opinion, the above said shall be the position of law under the 1956 Regulations where 'transfer of immovable property' has been defined and also under the 1950 Act where 'transfer of holding' has not been defined. Acquisition of title in favour of a non-tribal by invoking the Doctrine of Adverse Possession over the immovable property belonging to a

tribal, is prohibited by law and cannot be countenanced by the Court."

[emphasis supplied]

7. It is an admitted case that the appellants belongs to the Bhutia community and Revenue Order No. 1 of 1917 bans transfer of land from a person belonging to Bhutia community to a non-Bhutia community. In view of the legal position indicated above, I have no hesitation to hold that the plea of adverse possession taken by the private respondents against the appellant is untenable and the learned trial Judge erred in dismissing the suit on the ground of limitation by accepting the plea of adverse possession taken by the private respondents.

8. In view of what has been stated above, the impugned judgment and decree are hereby set aside. The matter is remitted to the learned trial Judge for disposal of the suit on merits, according to law.

9. The appeal is accordingly allowed. Costs to abide the event.

(R.K. Patra)
Chief Justice.
01.11.2004.

Dictation taken
&
typed by mc.
Tshering Dolkar.